App. 1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

ROBERT S. DIETRICH, Civil No. 01-498-TC

Petitioner,

vs.

S.W. CZERNIAK,

Respondent.

FINDINGS AND RECOMMENDATION

COFFIN, Magistrate Judge

BACKGROUND

Petitioner was indicted by a grand jury on charges of Sodomy in the First Degree (two counts), Sexual Abuse in the First Degree, Using a Child in the Display of Sexually Explicit Conduct, Rape in the First Degree, Unlawful Sexual Penetration in the First Degree, and Endangering the Welfare of a Minor (two counts), stemming from allegations that he sexually abused his stepdaughter from the time she was five until she turned ten and reported him. Although petitioner told his attorney at the outset of criminal proceedings that he wanted to plead guilty to all the charges, counsel advised him to wait and see if she could negotiate some of the charges away. Counsel felt that if the case were to go to trial, petitioner would be convicted on all charges. Petitioner ultimately wanted counsel to get the best deal possible, but continued to tell counsel that he did not want to go to trial. Eventually, petitioner's attorney secured a deal that required petitioner to plead guilty to four charges – two counts of first-degree sod-

omy, and one count each of first degree rape and first-degree unlawful sexual penetration – in exchange for the dismissal of the other four. After accepting his guilty pleas, the court sentenced petitioner to a total incarceration term of 265 months.[7]

Petitioner appealed his sentence, but the Oregon Court of Appeals denied his appeal without opinion. State v. Dietrich, 135 Or. App. 698, 899 P.2d 764 (1995). Petitioner sought review by the Oregon Supreme court, but review was denied. State v. Dietrich, 322 Or. 168, 903 P.2d 886 (1995), The appellate judgment became final on November 29, 1995.

Petitioner filed a petition for post-conviction relief, but the PCR court denied relief. He appealed the PCR court's decision, but the Oregon Court of Appeals granted summary affirmance. Petitioner did not immediately seek review by the Oregon Supreme Court, and in the absence of a petition for review, the appellate judgment became final on April 8, 1999.

On May 17, 2000, thirteen months after the appellate judgment became final, petitioner filed a motion with the Oregon Supreme Court seeking leave to file a late petition for review. The court granted that petition, and petitioner filed a petition for review. That petition was denied on February 6, 2001

On April 10, 2001, petitioner filed the petition for federal habeas corpus relief close [*sic*] presently before the court, alleging ineffective assistance of counsel and trial court error, both related to his entering guilty pleas to four of the eight charges against him. Respondent seeks dismissal of the peti-

---

[7] The term reflects a sentence of 58 months on the first sodomy conviction, a consecutive 91-month sentence on the second sodomy conviction, a consecutive 116-month sentence on the rape conviction, and a concurrent 121-month sentence on the unlawful penetration conviction.

tion on the grounds that it was not timely filed, and in the alternative argues that the state courts' decisions are due deference.

STANDARD OF REVIEW

Under the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner can seek federal habeas relief only within one year of the date on which the judgment became final by the conclusion of direct review, or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). AEDPA became effective on April 24, 1996. Any prisoner whose direct appeal had been final before that date had until April 23, 1997 to file his petition for federal habeas relief, or to properly file a legitimate state court action challenging the conviction, which would have the effect of tolling the running of the statute. 28 U.S.C. 2244(d)(2).

DISCUSSION

The appellate judgment on petitioner's direct appeal became final on November 29, 1995, prior to the effective date of AEDPA. As such, the one year statute of limitations provided for did not start running until April 24, 1996, the date the statute went into effect. Petitioner's PCR filing occurred on or about January 29, 1997, approximately 280 days after the clock started to run. His PCR proceedings tolled the statute until April 8, 1999, when the appellate judgment became effective. On that date, the clock started to run again.

Over a year after the appellate judgment became final, petitioner sought, and was granted, permission to file an untimely petition for Oregon Supreme Court review of the denial of his PCR petition.[8] At that point, the clock would

[8] Under the Oregon Rules of Appellate Procedure, petitioner had 35 days to seek review. ORAP 9.05(2).

clearly stop again. The critical question is whether petitioner's motion should operate retroactively to erase the time elapsed between the date the appellate judgment became final and the date petitioner filed his motion for leave with the Oregon Supreme Court. I find that it should not.

The operative statue regarding the tolling of statute of limitations for ongoing state proceedings is 28 U.S.C. § 2244(d)(2), which provides that:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

That provision suggests that a state post-conviction petition is pending from the time it is filed until the time the appellate judgment becomes final, including the time between the conclusion of one level of consideration and the start of the next level (i.e., the time after the trial court denies a petition but before the petitioner files his appeal). This interpretation was recently supported by the United States Supreme Court in Carey v. Saffold, 536 U.S. 214 (2002), where the court stated that an application is pending "as long as the ordinary state collateral review process is 'in continuance' – i.e. 'until the completion of that process.' In other words, until the application has achieved final resolution through the state's post-conviction procedures, by definition, it remains 'pending.'" Id. at 219-20. Put another way, the petitioner is entitled to "one full round" of collateral review without the interference of the federal statute of limitations. Id. at 222.

Petitioner argues that Carey compels the conclusion that the statute of limitations clock should be wound back from the date he filed his motion for leave with the Oregon Supreme Court to the date he filed his post-conviction petition, because

each filing was in the same round of collateral attack. However, Carey need not, and should not, be interpreted so broadly.

As noted above, the court interpreted "pending" to mean that the process is "in continuance" and that the statute should be tolled until final resolution "through the State's post-conviction procedures." However, here petitioner's collateral proceeding was not in continuance between the time the Oregon Court of Appeals granted summary affirmance to the time he sought leave to file a petition for review. The proceeding ended when he did not seek review by the Oregon Supreme Court in the time allowed for by the Oregon Rules of Appellate Procedure, as reflected by the fact that the final appellate judgment issued in April 1999. Thus, pursuant to "the State's post-conviction procedures," Carey at 220, petitioner's collateral attack concluded at the Court of Appeals. That petitioner later received permission to make a filing outside the established procedures should not have the effect of retroactively "untolling" the statute under a strained interpretation of "pending" simply because the filing related to the same "round" of review, particularly when that "round" had, under the state's procedures, already concluded.[9] A more appropriate analysis, and one which allows for consideration of any potential extraordinary factors, is whether the time that elapsed should be equitably tolled.

---

[9] I note that the situation here is not one where petitioner was close to meeting his procedural deadline but fell short by a few days; he was well over a year late of the established deadline for in [*sic*] seeking Oregon Supreme Court review of the denial of his petition. Such is quite different from the four-and-a-half month delay in seeking similar review in Carey, which occurred under California's rule simply requiring a filing within an unspecified "reasonable" time.

For that time to qualify for equitable tolling, petitioner must demonstrate that the delay in filing which caused the AEDPA limitations statute to expire was caused by "extraordinary circumstances beyond [his] control." Miranda v. Castro, 292 F.3d 1063 (9th Cir. 2002) (emphasis in original); see also Calderon v. United States District court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997). Here, petitioner points to the lack of assistance from his post-conviction attorney as the circumstance that prevented his timely filing, alleging that the attorney failed to notify him when the Oregon Court of Appeals granted the state summary affirmance, failed to notify him that he needed to seek review within 35 days, and failed to inform him of the issuance of the appellate judgment. However, these allegations fall squarely within the parameters of ordinary attorney negligence that the Ninth Circuit has routinely held to be inadequate grounds for equitable tolling. See, e.g., Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001); Ford v. Hubbard, 330 F.3d 1086, 1106 (9th Cir. 2002); see also Castro, 292 F.3d at 1067 n.4 (collecting cases); cf. Spitsyn v. Moore, 354 F.3d 796 (9th Cir. 2003) (holding that a complete failure to file his client's habeas petition and the retention of the client's files beyond the limitations period, despite numerous requests by the client, could be "sufficiently egregious" to warrant tolling).

Because petitioner has not alleged facts which would warrant equitable tolling, and because his habeas petition was filed after the expiration of the AEDPA statute of limitations for such filings, the petition should be denied.

CONCLUSION

For the above stated reasons, the amended petition for a writ of habeas corpus (#20) should be denied and the court should enter a judgment dismissing the action.

DATED this 9th day of September, 2004.

/s/ Thomas M. Coffin

Thomas M. Coffin

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

ROBERT S. DIETRICH, Civil No. 01-498-TC

Petitioner,

vs.

S.W. CZERNIAK,

Respondent.

ORDER

Aiken, Judge:

Magistrate Judge Coffin issued his Findings and Recommendation in the above-captioned action on September 9, 2004. Magistrate Judge Coffin recommends that the amended petition for writ of habeas corpus be denied and the case be dismissed. Magistrate Judge Coffin found that the petition was filed beyond the one-year statute of limitations period under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), and that the doctrine of equitable tolling did not apply. 28 U.S.C. § 2244(d)(1). The matter is now before me. See 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b).

When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the magistrate judge's report. See 28 U.S.C. §636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Petitioner has filed timely objections to the Findings and Recommendation. I have, therefore, given de novo review of Judge Coffin's well-reasoned opinion, and I find no error.

THEREFORE, IT IS HEREBY ORDERED that Magistrate Judge Coffin's Findings and Recommendation (doc. 62) filed September 9, 2004, is ADOPTED in its entirety. The Amended Petition for Writ of Habeas Corpus (doc. 20) is DENIED, and this case is DISMISSED. IT IS SO ORDERED.

Dated this 15th day October, 2004.

/s/ Ann Aiken
Ann Aiken
United States District Judge

App. 10

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

ROBERT S. DIETRICH,

Petitioner,

vs.

S.W. CZERNIAK, Civil No. 01-498-TC

Respondent.

JUDGMENT

This action is dismissed.

Dated: October 18, 2004.

Donald M. Cinnamond, Clerk
By: /s/ Leslie Engdall, Deputy
Leslie Engdall, Deputy

JUDGMENT **DOCUMENT NO: 67**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT SANFORD DIETRICH, No. 04-36063

Petitioner-Appellant, D.C. No. CV-01-00498-TMC

vs.

STAN W. CZERNIAK, Superintendent, Oregon State Penitentiary, MEMORANDUM*

Respondent-Appellee.

Appeal from the Untied States District Court

for the District of Oregon

Thomas M Coffin, Magistrate Judge, Presiding

Argued and Submitted September 13, 2006

Portland, Oregon

Before: HAWKINS, SILVERMAN, and GOULD, Circuit Judges.

Petitioner Robert Dietrich ("Dietrich") appeals the district court's ruling that statutory and equitable tolling are inapplicable to prevent his habeas petition from being time-barred under the Antiterrorism and Effective Death Penalty Act of

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

1996 ("AEDPA'), 28 U.S.C. § 2241 *et. seq.* We have jurisdiction pursuant to 28 U.S.C. §§1291 and 2253. We affirm in part, and vacate and remand in part.

On January 29, 1997, Dietrich, with the assistance of appointed counsel, sought post-conviction relief in the Oregon trial court based on claims that his trial counsel was incompetent and Petitioner entered into an involuntary plea agreement. The trial court denied post-conviction relief. After a timely appeal, the Oregon Court of Appeals granted Respondent's motion for summary affirmance on January 22, 1999. When Petitioner did not seek discretionary review, the appeals court issued a final judgment on April 8, 1999 dismissing the claims.[1] Almost a year later, Dietrich learned of the dismissal by obtaining a copy of the docket sheet. He then promptly mailed a *pro se* motion for leave to file a late petition for discretionary review with the Supreme Court of Oregon, which was docketed on May 17, 2000. According to Dietrich, post-conviction counsel did not notify him of the result of the post-conviction review, despite Dietrich's several inquiries about the status of the appeal. The Supreme Court of Oregon granted Dietrich's motion for leave to file a late petition, but denied the petition on the merits on February 6, 2001.

The district court dismissed Petitioner's federal petition for habeas corpus as untimely. Adopting the Magistrate Judge's Findings and Recommendation, the district court held that under 28 U.S.C. § 2244(d)(2) and *Carey v. Saffold*, 536 U.S. 214 (2002), the interval between the April 8, 1999 judgment and Petitioner's May 17, 2000 motion for leave to file

---

[1] Under Oregon law, a petitioner is allowed 35 days to file a petition for discretionary review with the Supreme Court of Oregon. *See* Or. Rev. State. § 2.520 and Or. R. App. P. § 9.05. Petitioner's time for filing a petition for discretionary review expired on February 26, 1999.

an untimely petition was not tolled by the statute because no state application was "pending" during this period.[2] The district court also held that equitable tolling was unjustified because allegations that counsel failed to notify Petitioner of the appellate judgment at best amounted to ordinary attorney negligence.

We review *de novo* the district court's denial of a petition for writ of habeas corpus as untimely. *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999). Findings of fact are reviewed for clear error. *Riley v. Payne*, 352 F.3d 1313, 1317 (9th Cir. 2003).

I. Statutory Tolling

Petitioner is not entitled to statutory tolling because he had no application for post-conviction relief pending during the interim between the April 8, 1999 judgment and Petitioner's May 17, 2000 motion for leave to file an untimely petition. In a recent decision clarifying *Saffold*, 536 U.S. 214, the United States Supreme Court held that "[t]he time that an application for state postconviction review is 'pending' includes the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, *provided that* the filing of the notice of appeal is timely under state law." *Evans v. Chavis*, 126 S. Ct. 846, 849, 163 L. Ed. 2d 684 (2006) (emphasis original).

Here, Dietrich did not under state law file a timely petition for discretionary review in the Supreme Court of Oregon. A person may petition the state supreme court "within 35 days

---

[2] Because eighty-five days remained under the statute of limitations when Petitioner filed his initial state application on January 29, 1997, his federal petition was time-barred in light of the untolled period after the state court of appeals judgment.

after the date of the decision." Or. Rev. State. § 2.520. A petition after the 35-day period is late, even if the state supreme court forgives the untimeliness by granting a motion for leave to file a late petition.[3] When Petitioner's substantive claims were dismissed under the April 8, 1999 judgment, his application ceased to be "pending" in the ordinary appellate process. Dietrich's case was pending until April 8, 1999, and then was pending *again* after Dietrich reopened the case by seeking discretionary review through the May 17, 2000 motion. The interval between the pendencies, however, is not tolled by the statute because at that time the claim for relief was not pending. 28 U.S.C. § 2244(d)(2).

II. Equitable Tolling

The mere ineffective assistance of post-conviction counsel cannot be the basis for equitable tolling. *See Miranda v. Castro*, 292 F.3d 1063, 1067-1068 (9th Cir. 2002) (holding appointed counsel's miscalculation of the AEDPA limitations period was not grounds for equitable tolling because petitioner has no right to effective assistance of counsel during the post-conviction phase). We have acknowledged, however, "that where an attorney's misconduct is sufficiently egregious, it may constitute an 'extraordinary circumstance' warranting equitable tolling of AEDPA's statute of limitation." *Spitsyn v. Moore*, 345 F.3d 796, 800 (9th Cir. 2003) (remanding for determination of equitable tolling where retained post-conviction counsel made affirmative statements that he would file federal habeas petition but failed to do so, and where counsel did not release file to petitioner upon request). De-

---

[3] Dietrich's request for discretionary review to the Supreme Court of Oregon was entitled "Motion for Leave to File *Late* Petition for Review and Substitute Counsel." (Emphasis added).

termining whether equitable tolling is warranted is a "fact-specific inquiry." *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001).

Here, no evidentiary hearing was held. The district court adopted the Magistrate Judge's determination that equitable tolling was not warranted where Petitioner recited that "the attorney failed to notify him when the Oregon Court of Appeals granted the state summary affirmance, failed to notify him that he needed to seek review within 35 days, and failed to inform him of the issuance of the appellate judgment." The district court, however, did not note the alleged attempts by Petitioner and his mother to reach the post-conviction counsel to inquire about Petitioner's case status. These facts were alleged in the record in Petitioner's brief in support of his May 17, 2000 motion for leave to file late petition.[4] It is thus unclear to what extent, if any, post-conviction counsel's lack of communication with or non-responsiveness to Petitioner and his mother hindered Petitioner from proceeding with his state application. *See Spitsyn*, 345 F.3d at 801 ("[W]ithout the file . . . it seems unrealistic to expect [petitioner] to prepare and file a meaningful petition on his own within the limitations period."). Because we consider there to be an insufficient development of the record, we cannot determine whether Petitioner faced extraordinary circumstances sufficient to justify equitable tolling. We conclude that a remand is appropriate for an evidentiary hearing, to be followed by the district court's legal ruling on equitable tolling. The district court in the evidentiary hearing should determine the circumstances in which Petitioner attempted to inquire about the status of his case and obtain his file and any impact these circumstances, once de-

---

[4] The details of Petitioner's prior allegations are recited in the Petitioner's unsuccessful request to the district court for an evidentiary hearing, within Exhibit 130 to that request.

termined by the district court, may have had on Petitioner's ability to advance his interests in seeking a timely discretionary review by the Supreme Court of Oregon of his post-conviction claims for relief.

The district court's dismissal of Dietrich's petition as time-barred is **VACATED**. The case is **REMANDED** to the district court for an evidentiary hearing related to equitable tolling and for other proceedings not inconsistent with this decision.